

Message Text

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ACTION OES-07

INFO OCT-01 NSF-01 ISO-00 L-03 AF-10 ARA-10 EA-07
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FEAE-00 CIAE-00 DODE-00 INR-07 NSAE-00 PA-01
USIA-06 PRS-01 SP-02 CG-00 DOTE-00 PM-04 NSC-05
SS-15 /128 W

-----038762 131908Z /42

P 131710Z JUL 77

FM AMEMBASSY LONDON

TO SECSTATE WASHDC PRIORITY 6070

C O N F I D E N T I A L SECTION 01 OF 02 LONDON 11541

E.O.11652: GDS

TAGS: TGEN, XV, UK

SUBJECT: ANTARCTIC TREATY: ADMISSION TO CONSULTATIVE

STATUS: BRITISH VIEWS ON PROCEDURES DRAFT

REF: (A) LONDON 11258; (B) LONDON 10570

1. FOLLOWING NINTH MONTHLY PREPARATORY MEETING ON JULY 6, HEAP PROMISED TO PROVIDE US WITH FCO LEGAL ADVISOR DAVID ANDERSON'S CONSIDERED VIEWS ON THE CHAIRMAN'S "SNT" IN LIGHT OF U.S. AND OTHER COMMENTS. TEXT OF ANDERSON MEMO TO HEAP FOLLOWS. BEGIN TEXT:

(A) IN THE LIGHT OF THE DISCUSSION AT THE APM ON 6 JULY, I OFFER THE FOLLOWING COMMENTS ON THE DRAFT TEXT DATED 23 JUNE. THE SOVIET PROPOSAL TO AVOID NAMING THE GOVERNMENTS MAY HAVE BEEN PUT FORWARD BY A WISH TO AVOID A REFERENCE TO SOUTH AFRICA. AS DRAFTED, THE INSTRUMENT TAKES ON AN ADDED DEGREE OF "TREATY CHARACTER" BY VIRTUE OF NAMING THE GOVERNMENTS. IT TENDS TO MAKE IT MORE LIKE A TREATY SEPARATE FROM THE ANTARCTIC TREATY, EVEN THOUGH IT IDENTIFIES THE 12 AS CONSULTATIVE PARTIES. THE PRESENT WORDING ALSO IMPLIES THAT AT THE MOMENT OF ITS ADOPTION POLAND IS NOT A CONSULTATIVE PARTY, THUS PREJUDGING THE

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QUESTION OF INTERPRETATION. IN ORDER TO MEET THE RUSSIAN POINT AND TO AVOID TOO MUCH THE APPEARANCE OF A SEPARATE TREATY BY THE 12, I SUGGEST USING THE FOLLOWING:

"THE GOVERNMENTS PARTICIPATING IN THE SPECIAL CONSULTATIVE MEETING UNDER THE ANTARCTIC TREATY,".

ALTERNATIVELY, WE COULD SAY:

"THE GOVERNMENTS NAMED IN THE PREAMBLE TO THE

ANTARCTIC TREATY".

(B) AS REGARDS THE FOURTH PREAMBULAR PARAGRAPH, I AGREE WITH THE U.S. POINT THAT THE WORDING MAY BE MORE RESTRICTIVE THAN ARTICLE IX(2) OF THE TREATY. THE WORDING BEGINS BY "RECOGNIZING" SOMETHING AND THAT SOMETHING HAS TO BE A REALITY. THE TEXT SHOULD NOT RECOGNIZE SOMETHING WHICH IS NOT IN CONFORMITY WITH THE TREATY. THE U.S. POINT COULD PERHAPS BE MET BY MAKING THE PARAGRAPH READ:

"DEPENDS ON SUCH A STATE CONDUCTING SUBSTANTIAL SCIENTIFIC RESEARCH IN THE ANTARCTIC SUCH AS ESTABLISHING A SCIENTIFIC STATION OR DESPATCHING A SCIENTIFIC EXPEDITION;"

(C) THE U.S. CRITICISM OF THE "ENACTING PROVISION" READING "HAVE HEREBY DECIDED . . . STATUS" IS ALSO WELL-FOUNDED. WHAT GOVERNS CONSULTATIVE STATUS IS THE TREATY; AND THE 12 CANNOT DISPLACE THE TREATY BECAUSE THE OTHER PARTIES CAN RELY UPON IT VIS-A-VIS ALL OTHER PARTIES. THE WORD "MEASURES" APPEARS IN ARTICLE IX(1) AND (4) (WHICH MAY LEAD TO CONFUSION) AND THE WORD "ADMISSION" PREJUDGES THE QUESTION OF INTERPRETATION OF ARTICLE IX (2). THE WHOLE PROBLEM COULD BE AVOIDED BY REWORDING THE FORMULA TO READ SIMPLY "HAVE HEREBY DECIDED AS FOLLOWS:". I WOULD OBSERVE THAT THE WORD "DECIDE" IS A STRONG WORD, PLACING THE RESULTING INSTRUMENT IN THE FIELD OF TREATY LAW. I SEE NO OBJECTION TO THIS SO LONG

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AS WHAT IS BEING DECIDED IS NOT CONTRARY TO THE TREATY. (D) OPERATIVE PARAGRAPH 1 SEEKS TO IMPOSE AN OBLIGATION ON AN ACCEDING STATE EVEN THOUGH IT IS NOT BOUND BY THE TEXT. THIS MAY NOT MATTER IN PRACTICE. HOWEVER, THE AMERICAN POINT THAT THIS PARAGRAPH IS MORE RESTRICTIVE THAN ARTICLE IX(2) IS WELL-FOUNDED. THE TEXT SHOULD READ:

"AN ACCEDING STATE WHICH DEMONSTRATES ITS INTEREST IN ANTARCTICA BY CONDUCTING SUBSTANTIAL SCIENTIFIC RESEARCH ACTIVITIES THERE, SUCH AS THE ESTABLISHMENT OF A SCIENTIFIC STATION OR THE DESPATCH OF A SCIENTIFIC EXPEDITION, SHALL NOTIFY . . .".

THE REFERENCE TO ARTICLE VII(5) MAY IMPLY THAT ACCEDING STATES WHICH ARE NOT CONDUCTING SUBSTANTIAL SCIENTIFIC RESEARCH BUT MERELY A SMALL AMOUNT OF SUCH RESEARCH ARE NOT UNDER ANY OBLIGATION TO NOTIFY UNDER ARTICLE VII(5), CONTRARY TO WHAT THE TREATY PROVIDES IN FACT. IT WOULD BE POSSIBLE TO AVOID THIS DIFFICULTY BY GOING BACK TO THE DRAFT OF 28 APRIL WHICH WAS MORE SPECIFIC IN REQUIRING THE ACCEDING STATE TO INFORM THE CONSULTATIVE PARTIES "OF THE CONTENT AND OBJECTIVES OF ITS SCIENTIFIC PROGRAM". ANOTHER WAY WOULD BE TO PROVIDE THAT "AN ACCED-

ING STATE . . . SHALL NOTIFY ALL THE CONSULTATIVE PAR-

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USIA-06 PRS-01 SP-02 CG-00 DOTE-00 PM-04 NSC-05
SS-15 /128 W
-----038761 131907Z /42

P 131710Z JUL 77
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TO SECSTATE WASHDC PRIORITY 6071

C O N F I D E N T I A L SECTION 02 OF 02 LONDON 11541

TIES, IN IMPLEMENTING ITS OBLIGATIONS UNDER ARTICLE VII
(5) OF THE ANTARCTIC TREATY, OF ITS ACTIVITIES IN THE
ANTARCTIC AND, IN PARTICULAR, THE CONTENT AND OBJECTIVES
OF ITS SCIENTIFIC PROGRAMME, HAVING REGARD TO THE
ARRANGEMENTS REGARDING THE EXCHANGE OF INFORMATION CON-
TAINED IN RECOMMENDATIONS OF CONSULTATIVE MEETINGS".
(E) THE SOUTH AFRICAN PROPOSAL TO ADD "FORTHWITH" AFTER
"NOTIFICATION" APPEARS ACCEPTABLE.
(F) THE U.S. POINT THAT THE LAST BIT OF OPERATIVE PARA-
GRAPH 3 GOES BEYOND ARTICLE 9(2) IS WELL TAKEN. IT IS
TRUE THAT, AS CHILE AND ARGENTINA ARGUED, A CONSULTATIVE
PARTY HAS THE RIGHT TO ASK AN ACCEDING STATE ANY QUES-
TION IT WISHES, INCLUDING A QUESTION AS TO ITS ATTITUDE
TOWARDS EXISTING RECOMMENDATIONS. BUT IT IS NOT TRUE
THAT A CONSULTATIVE PARTY HAS THE RIGHT TO MAKE ITS
DECISION UPON THE QUESTION OF CONSULTATIVE STATUS DEPEND
UPON THE ACCEDING STATE'S ACCEPTANCE OF EXISTING RECOM-
MENDATIONS. TO DO SO WOULD BE TO IMPOSE AN OBLIGATION
OF AN ACCEDING STATE BEYOND WHAT IS CONTAINED IN THE
TREATY, THEREBY VIOLATING ARTICLE IX(2). PARAGRAPH 3
IS NOT WORDED IN A NEUTRAL WAY ON THIS ISSUE: A NEUTRAL
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FORMULA WOULD BE "TO PROVIDE A STATEMENT REGARDING "RECOMMENDATIONS" OR "REGARDING ITS ATTITUDE TOWARDS RECOMMENDATIONS." A SEPARATE QUESTION IS WHETHER THE STATEMENT SHOULD RELATE TO ALL RECOMMENDATIONS, INCLUDING THOSE NOT IN EFFECT OR JUST TO THOSE WHICH ARE IN EFFECT. THE ARGUMENT FROM THE LATINS THAT SOME OF THE RECOMMENDATIONS NOT IN EFFECT ARE BEING APPLIED AS GUIDELINES IS NOT A SOUND ARGUMENT BECAUSE THEY ARE BEING SO APPLIED PURSUANT TO RECOMMENDATIONS WHICH REFER TO OTHERS WHICH ARE NOT IN EFFECT. ACCORDINGLY, AN ACCEDING STATE COULD INDICATE ITS ATTITUDE TOWARDS A GUIDELINES RECOMMENDATION WHICH REFERRED TO ANOTHER RECOMMENDATION WHICH WAS NOT IN FORCE.

(G) AS REGARDS OPERATIVE PARAGRAPH 4, THE U.S. POINT THAT THERE MAY BE NO NEED FOR A SPECIAL CONSULTATIVE MEETING IN ALL CASES MAY BE CORRECT BUT THE NEGOTIATIONS HAVE PROCEEDED FOR A LONG TIME ON THE BASIS THAT THERE WOULD BE SUCH A MEETING.

(H) THE U.S. AND FRENCH OBJECTIONS TO THE WORDS "DECISION" AND "UNANIMOUS" COULD BE MET BY USING THE WORDS "THE CONSULTATIVE MEETING SHALL PROCEED BY WAY OF CONSENSUS WHICH SHALL BE MADE PUBLIC IN THE FINAL REPORT..." THE NEXT SENTENCE CONTAINS THE WORD "AGREEMENT" WHICH COULD ALSO BE REPLACED BY "CONSENSUS." THE SENTENCE ALSO REFERS TO "THE ADMISSION . . .": THAT COULD BE AVOIDED BY SAYING "THE REQUIREMENTS OF ARTICLE IX(2) OF THE ANTARCTIC TREATY HAVE BEEN MET, AN INVITATION . . .".

(I) IN OPERATIVE PARAGRAPH 6, THE PHRASE "HAVING BEEN THUS INVITED INTO CONSULTATIVE STATUS IN ACCORDANCE WITH THE ABOVE MEASURES" IS INCONSISTENT WITH ARTICLE IX(2) OF THE TREATY. I SUGGEST THAT THE PARAGRAPH SHOULD READ:

"A STATE WHICH BECOMES ENTITLED TO CONSULTATIVE STATUS IN ACCORDANCE WITH ARTICLE IX(2) OF THE TREATY
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SHALL CONTINUE TO ENJOY THAT STATUS SUBJECT TO ARTICLE IX(2) OF THE TREATY". END TEXT.

2. PARAGRAPH E REFERS TO INFORMAL SOUTH AFRICAN SUGGESTION THAT "FORTHWITH" BE ADDED TO SECOND OPERATIVE PARAGRAPH OF "SNT" SO THAT IT READS "SHALL COMMUNICATE THAT NOTIFICATION FORTHWITH TO ALL OTHER CONSULTATIVE PARTIES."
BREWSTER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01-Jan-1994 12:00:00 am
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: ANTARCTIC TREATY, MEETING REPORTS, VISITS, NEGOTIATIONS
Control Number: n/a
Copy: SINGLE
Sent Date: 13-Jul-1977 12:00:00 am
Decaption Date: 01-Jan-1960 12:00:00 am
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 22 May 2009
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1977LONDON11541
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: GS
Errors: N/A
Expiration:
Film Number: D770249-0849
Format: TEL
From: LONDON
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1977/newtext/t19770763/aaaacchc.tel
Line Count: 222
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: 60f9576c-c288-dd11-92da-001cc4696bcc
Office: ACTION OES
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators: n/a
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: 77 LONDON 11258, 77 LONDON 10570
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 15-Mar-2005 12:00:00 am
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 1879539
Secure: OPEN
Status: NATIVE
Subject: ANTARCTIC TREATY: ADMISSION TO CONSULTATIVE STATUS: BRITISH VIEWS ON PROCEDURES DRAFT
TAGS: TGEN, XV, UK, FCO, (ANDERSON, DAVID)
To: STATE
Type: TE
vdkgvwkey: odb://SAS/SAS.dbo.SAS_Docs/60f9576c-c288-dd11-92da-001cc4696bcc
Review Markings:
Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
22 May 2009
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009